No. 86-421 (A)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

—v.—

ROTARY CLUB OF DUARTE, et al.,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF OF THE ROTARY CLUB OF SEATTLE — INTERNATIONAL DISTRICT, ROTARY CLUB OF BOSTON, SITKA ROTARY CLUB, ROTARY CLUB OF SAN FRANCISCO, AND "AWARE: ACCEPT WOMEN AS ROTARY EQUALS" AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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This brief is submitted by the Rotary Club of Seattle-International District and other Rotary organizations described below as amici curiae in support of appellees Rotary Club of Duarte and its individual members. Written consent of the parties

pursuant to Supreme Court Rule 36.2 has been obtained and will be filed with the Clerk of the Court along with this brief.

INTERESTS OF AMICI CURIAE

Amici Rotary Club of Seattle-International District (the "Seattle Club"), Rotary Club of Boston, Sitka Rotary Club, Rotary Club of San Francisco and a worldwide association of Rotary members known as "AWARE: Accept Women As Rotary Equals" are active members and participants in the Rotary organization. As such, they have a vital interest in assuring that this Court does not condone the exclusion of women as members of Rotary. These amici and many other Rotary members, though they continue to believe in Rotary's other commendable goals and aspirations, wish to end Rotary's outdated discriminatory membership practices. Given the increasing role of women in business and the professions, these amici

believe that inclusion of women is important to the continued vitality of Rotary as an organization.

1. Rotary Club of Seattle - International District.

The Seattle Club recently admitted several women as members. Subsequently, the Seattle Club, along with three of its male members and three of the new female members, brought suit against Rotary International on the grounds that Rotary International's arbitrary and discriminatory membership policy which excludes women violates the Washington Law Against Discrimination, Chapter 49.60 RCW, and other related statutes. This case is now pending in the United States District Court for the Western District of Washington at Seattle.[1]

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[1] Rotary Club of Seattle-International District v. Rotary International, No. C86-1475M (W.D. Wash. filed Sept. 15, 1986).

The Washington Law Against Discrimination, which includes an equal access to public accommodations provision, is similar in intent and scope to the Unruh Civil Rights Act, California Civil Code § 51. The Washington State Human Rights Commission and the Washington Attorney General's Office filed an amicus brief in the Seattle Club's case expressly taking the position that the Washington public accommodations statute applies to prohibit discriminatory membership requirements in organizations such as Rotary.

The record in the Seattle litigation demonstrates that the membership selection process actually used by Rotary clubs is not highly selective and varies considerably from the "official policy" expressed by Rotary International. In addition, the

record clearly establishes tangible business benefits accruing to individuals who are members of Rotary.[2]

2. Rotary Club of Boston.

The Rotary Club of Boston is losing members, potential speakers, and prestige because it is prohibited from admitting women by Rotary International. Ten years ago, the Boston Club had 250 members. Today it has 180 members, and President Kerck Kelsey attributes the drop in membership, at least in part, to Rotary International's discriminatory policy. Several speakers have ceased accepting speaking engagements with the Boston Club in protest of women's exclusion from Rotary. Like other Rotary clubs across

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[2]The Seattle litigation was filed only four months ago, in September 1986. Discovery in that case can be expected to reveal a substantial amount of additional factual information indicating that Rotary is not "private" in a constitutional sense.

the country, the Boston Club has also lost the support of corporations such as NewWorld Bank and John Hancock Mutual Life Insurance Co., who have refused to pay their employees' Rotary dues until Rotary clubs stop discriminating against women.

The Boston Club believes Rotary International's discriminatory policy is in violation of Massachusetts antidiscrimination laws. Massachusetts Public Accommodations Law, Mass. Gen. L. ch. 272, § 98, prohibits discrimination in "any place of public accommodation, resort or amusement." Under the applicable Massachusetts Supreme Judicial Court ruling,[3] Rotary must abide by the statute because it meets in a place of public accommodation.

Rotary International is also in violation of the Massachusetts Civil Rights

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[3]United States Jaycees v. Massachusetts Commission Against Discrimination, 391 Mass. 594 (1984).

Act, Mass. Gen. L. ch. 12, § 11H, which prohibits any person from interfering or attempting to interfere with another's exercise or enjoyment of rights secured by the Constitution or laws of the United States or of Massachusetts. Rotary International is interfering with women's rights under the Massachusetts Equal Rights Amendment by barring women from Rotary.

3. Sitka Rotary Club.

Sitka Rotary Club, located in Sitka, Alaska, has over 40 members. The Sitka Club is among those clubs actively seeking to change the Rotary International constitution and by-laws to permit Rotary clubs to admit women as members. The Sitka Club sponsored a successful resolution at the most recent Rotary District 503 convention which urged that individual Rotary clubs be permitted to decide whether to admit women as members. (App. K.) The Sitka

Club recently passed a resolution supporting all legal challenges aimed at admitting women as members. (App. L.)

4. Rotary Club of San Francisco.

Although the Rotary Club of San Francisco is the second oldest Rotary club in the world, it is in the forefront in accepting women as members of Rotary. The San Francisco Club has a vital interest in seeing the California public accommodations law upheld in this Court, so that it can continue to admit women as members and keep the excellent women members already admitted to the club. The San Francisco Club has 560 members, including seven newly admitted women members. Among these new members is San Francisco's mayor, Dianne Feinstein. Many more women are in the process of being admitted to the San Francisco Club at the present time.

If the California law is upheld, the San Francisco Club will also be able to

retain corporate support and regain the corporate support lost in the last few years when, because of Rotary International's discriminatory policy against women, corporations such as IBM, Levi Strauss and Bank of America refused to pay their employees' Rotary dues.

5. AWARE.

"AWARE: Accept Women As Rotary Equals" is an informal alliance of Rotarians from throughout the world whose declared purpose is to work within Rotary to permit the admission of women as regular members of Rotary clubs. AWARE currently has a mailing list of over 300 individual Rotarians and Rotary clubs who each periodically receive AWARE's newsletter discussing recent events affecting the goal of admitting women as full members of Rotary clubs.

SUMMARY OF ARGUMENT

This Court's recent discussion of freedom of "intimate association" and of "expressive association" in Roberts v. United States Jaycees, 468 U.S. 609 (1984), provides the framework for analysis of Rotary International's contention that the California Unruh Civil Rights Act impermissibly impinges on its rights to freedom of association.[4] The question of whether the Unruh Act applies to Rotary

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[4]In the course of this appeal, Rotary International also challenges the Unruh Act on the grounds of vagueness and overbreadth. These amici do not comment on this issue because this argument was neither considered nor passed on by the state court below, and thus should not be considered by this Court.

The "not pressed or passed upon in the courts below" rule requires this Court to forego consideration of entirely new questions which were not both raised and decided by the courts below. Illinois v. Gates, 462 U.S. 213, 218 (1983) (quoting McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940)). Moreover, in ruling on the Unruh Act, these amici urge this Court to consider that a very limited record was placed before the trial court and that numerous other states have similar legislation which will be impacted by any broad ruling.

is an issue of state law on which the determination of the California courts is final.[5] The only issue for this Court is whether California's prohibition against gender discrimination, as applied in this case, violates the federal Constitution.

In Roberts, this Court upheld application of a similar Minnesota statute against the Jaycees, holding that states' compelling interest in eradicating discrimination against women justified legislation requiring organizations not characterized by intimate personal relationship to admit women as members. Like the Jaycees, Rotary is not an "intimate" group and the expressive activities of its

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[5]Similarly, other states must remain free to determine whether their comparable statutes apply to organizations such as Rotary.

male members would not be impaired by admission of women members.[6]

Legislative enactments prohibiting gender discrimination are valid as long as they are content-neutral and are no more restrictive than necessary to accomplish their antidiscriminatory purpose. The few restrictions necessary to protect individual freedoms under the First Amendment must be narrowly limited and are not applicable here. Because of its size and public persona, among other things, Rotary does not involve the "highly personal" family-like relationships entitled to the constitutional protection of intimate

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[6]Rotary International now argues that "[t]he differences between Rotary and the Jaycees . . . are significant and controlling." (Appellants' Br. at 29.) In its amicus submission to this Court in Roberts, however, Rotary International repeatedly referred to Rotary and Jaycees together and insisted that both were "private clubs." See, e.g., Amicus Curiae Brief of Rotary International at 13, Roberts v. United States Jaycees, No. 83-724 (U.S. filed Mar. 26, 1984).

association. To the extent that Rotary membership implicates expressive activities protected by the First Amendment, any incidental impact on rights of expressive association is outweighed by the recognized compelling state interests in eliminating gender discrimination. Any organization such as Rotary which provides significant business advantages to its members should be considered commercial, and therefore subject to rational state regulation to accomplish equality of advantage for all citizens, regardless of the organization's "official" statements of a noncommercial purpose.

ARGUMENT

I. This Court Has Previously Determined That States Have a Compelling Interest in Eliminating Discrimination Against Women.

It is firmly established that society has a compelling interest in "eradicating

discrimination against its female citizens," and may act to do so by "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Roberts, 468 U.S. at 623, 626. Arbitrary exclusion from jobs, schools, businessmen's clubs and other avenues of achieving success in the business world are among those barriers which the state may legitimately proscribe, as California has done in the Unruh Civil Rights Act at issue here.

Antidiscrimination statutes have historically served the important purpose of providing a mechanism enforcing rights to equal access and opportunity. One form of antidiscrimination law is the public accommodations statute, which began as a statute prohibiting discrimination in public accommodations, but has become in many

states a prohibition against discrimination by any establishment which offers goods and services of any kind to the public. See Discrimination and Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 218 (1978). After the Court overturned the early federal public accommodations law in 1883, for many years states were the only forum for challenging discriminatory practices in public accommodations. Roberts, 468 U.S. at 624. The great majority of states have appropriately responded with their own public accommodations laws to counter discrimination.[7]

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[7] See Discrimination and Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 242-43 (1978) for a listing of the 38 states, plus the District of Columbia, which have public accommodations statutes.

As awareness of discrimination has increased, the coverage of such statutes has broadened. In recent years, the majority of states have recognized that sex discrimination is pervasive and debilitating (see App. I-3 to I-8)[8] and have included sex among the classifications protected from discrimination. Washington is no exception. In their amicus curiae brief in Rotary Club of Seattle-International District v. Rotary International,[9] Washington State Human

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[8]The appendix to this amicus brief is cited simply as "App." These amici have adopted the form used in Appellants' Brief, citing the Joint Appendix as "Jt. App." and the Appellants' Appendix filed with the Jurisdictional Statement as "J.S. App."

[9]As discussed in the statement of interests, the Rotary Club of Seattle-International District has filed suit against Rotary International under the Washington Law Against Discrimination, Chapter 49.60 RCW, to enjoin enforcement against the Seattle Club of Rotary's discriminatory membership policy. Rotary Club of Seattle-International District v. Rotary International, No. C86-1475M (W.D. Wash. filed Sept. 15, 1986).

Rights Commission and Washington Attorney General stated:

> In 1973 the [Washington] legislature amended the state law against discrimination to include the right to be free from gender based discrimination in employment, places of public accommodation, real estate, credit and insurance transactions. . . . It is apparent that the state legislature found gender based discrimination to be a serious detriment to the general well-being of the people of this state. It is also apparent that a public policy was adopted prohibiting gender based discrimination over a broad range of commercial and economic activity.

(App. I-9 to I-10.)

The Washington State Human Rights Commission and Attorney General concluded that Rotary clearly comes within Washington's public accommodations statute and therefore

must abide by its antidiscrimination provisions. Their brief aptly assesses the outdated and inconsistent position of Rotary International:

> It is both deplorable and ironic that a world-wide organization which was founded in [the] United S[t]ates over 80 years ago to provide an opportunity for leaders in the business and professional communities to work together for community betterment, as well as their own personal gain, has not seen fit to recognize their own potential importance in opening up opportunities for full participation of women in the economic life of the communities they seek to serve.

(App. I-21 to I-22.)

In Roberts, this Court strongly supported the interest of Minnesota in barring gender discrimination in public accommodations, citing the grave social and personal harms, deprivation of dignity, and loss to society such discrimination can cause. Roberts, 468 U.S. at 625. These amici strongly urge this Court to validate the efforts of other states,

including California, Washington, Massachusetts and others, to eliminate gender discrimination by rejecting Rotary International's claim of constitutional immunity for its practice of discriminating against women.[10]

II. Rotary Membership Is Not "Distinctively Personal" and Therefore Does Not Enjoy Constitutional Protection of Intimate Association.

This Court has afforded constitutional sanctuar of "intimate association" only to "the formation and preservation of

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[10]In case after case throughout the United States, prohibitions against admission of female members in service clubs such as Rotary have been struck down as violating state public accommodations statutes similar to the California statute at issue here. See, e.g., Rogers v. International Association of Lions Clubs, 363 F. Supp. 1476 (E.D. Mich. 1986) (preliminary injunction granted); Kiwanis International v. Ridgewood Kiwanis Club, 627 F. Supp. 1381 (D.N.J. 1986), rev'd, ___ F.2d ___, 1 U.S.P.Q.2d 1062 (3d Cir. 1986); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981); United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983); Lloyd Lions Club of Portland v. International Association of Lions Clubs, 81 Ore. App. 151, 724 P.2d 887 (Ore. App. 1986).

certain kinds of highly personal relationships." Roberts, 468 U.S. at 618. The family relationships which have given rise to such rights[11] reflect not only the origins of the intimate association concept but also its limitations. See Roberts, 468 U.S. at 619. Most recently, in fact, this Court narrowly limited the scope of rights of intimate association, refusing to extend it even to all sexual practices between consenting adults. See Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986). In contrast to the cases in

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[11] See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Quilloin v. Walcott, 434 U.S. 246 (1978) (due process for family associations); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (rights of extended family to reside together); Carey v. Population Services International, 431 U.S. 678 (1977) (access to contraceptives); Wisconsin v. Yoder, 406 U.S. 205 (1973) (education of children); Roe v. Wade, 410 U.S. 113 (1973) (termination of pregnancy); Stanley v. Illinois, 405 U.S. 645 (1972) (paternal rights of unwed fathers); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education of children).

which rights of intimate association have been recognized, Rotary does not involve marriage, family or procreation.

Consideration of the factors outlined in Roberts demonstrates that Rotary, like Jaycees, falls clearly outside the category of relationships "worthy of this kind of constitutional protection," Roberts, 468 U.S. at 620. Distinctive characteristics of relationships which qualify for constitutional rights of intimate association include relative smallness, a high degree of selectivity, seclusion from others, and a wholly noncommercial purpose. See Roberts, 468 U.S. at 620. Absence of any of these attributes would disqualify an organization as an intimate association in the constitutional sense. Rotary's claim fails on all of these criteria.

A. Size.

With over one million members, Rotary International can hardly be characterized as a "relatively small" organization. Nor are individual Rotary clubs necessarily small. Rotary International's reference to the "average" size of Rotary clubs (Appellants' Br. at 7, 21) is extremely misleading. The Seattle No. 4 Rotary Club has over 750 members (App. D-1) and the San Francisco Rotary Club has 560 members. Many clubs in other cities similarly have memberships numbering in the hundreds.

In Roberts, this Court found that Jaycees clubs of approximately 400 members were "large" groups not entitled to constitutional protection for their policy of excluding women members. 468 U.S. at 621. Likewise, Rotary clubs of 750 or 560 members, or even 50 members for that matter, do not warrant the First Amendment

rights of intimate association which may attach to small family groups.[12]

B. Nonselectivity.

A second attribute distinguishing intimate relationships is "a high degree of selectivity in decisions to begin and maintain the affiliation." Roberts, 468 U.S. at 620. As "evidence" of its asserted selectivity, Rotary International relies on the admission procedures contained in its recommended[13] local club by-laws. (Appellants' Br. at 7-9.) Although this procedure and "classification" system may, on paper, give an

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[12]"Whatever the precise scope of the rights recognized in such cases [involving privacy rights of association], they do not encompass associational rights of a 295,000-member [or, as in this case, a one million-member] organization whose activities are not 'private' in any meaningful sense of that term." Roberts, 468 U.S. at 631 (O'Connor, J., concurring).

[13]These procedures are only "recommended" for "consideration" by local Rotary clubs. "There is no uniform set of rules that must be adopted by clubs." (Jt. App. 88.)

appearance of selectivity, the reality of how Rotary actually operates is far different. In practice, there is active solicitation of members, little or no selectivity and no significant barrier posed by any of the purported systems or procedures.

Rotary policy is to find (or create) a classification to fit each and every potential new member. (App. A-1 to A-2; E-5; F-1 to F-2.) In fact, Rotary club presidents-elect are exhorted to "make the classification fit the man. Don't lose a potentially good member . . . . [F]ind a classification that will cover his line of endeavor." (App. E-6.) In the experience of three Rotary club presidents whose testimony is in the record in the Seattle litigation, no prospective member is ever turned down for lack of an available classification. (App. A-1; E-5; F-2.) Moreover, selection of members is controlled

entirely by the local Rotary clubs. Apart from the exclusion of women, neither Rotary International nor any of the other approximately 22,000 local Rotary clubs have any voice in the selection of new members by a local club such as Duarte or the Seattle Club. Rotary International's brief misleads this Court by presenting the "recommended" by-laws as "fact" and failing to mention that the membership selection processes actually employed by the local clubs vary considerably from the "official" Rotary International policy.

Like the Jaycees, Rotary clubs "actively recruit" and "solicit" new members. (App. A-1 to A-2; E-5; F-1.) The only real screening criteria actually applied are that the prospective member be engaged in a business or profession, of "good reputation" and male, surely evidence of "attenuated" rather than intimate

association.[14] (App. E-5.) While Rotary's membership procedure "has the appearance of being elaborate, formal, and structured, in reality, it is not selective." Cf. Rogers v. International Association of Lions Clubs, 636 F. Supp. 1476, 1480 (E.D. Mich. 1986). Local Rotary clubs, like Jaycees, are "large and basically unselective groups," cf. Roberts, 468 U.S. at 621, eager to expand their membership.

C. Lack of Seclusion.

A third factor identified in Roberts is the degree of "seclusion from others in critical aspects of the relationship." 468 U.S. at 620. Rotary clubs, which perpetuate and emphasize their role in the public arena, do not operate in privacy or

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[14]Rotary International's official policy is "to produce an inclusive, not exclusive, membership." (J.S. App. C-2.) The turnover in Rotary clubs averages from 10 to 20% a year. (J.S. App. C-28; App. E-3.)

seclusion. Through open meetings, broad exchanges with other clubs, sponsorship of public debates and participation of non-members, Rotary clubs and their members are anything but private.

By official policy and actual practice, Rotary club meetings and activities are open not only to members of all other Rotary clubs, but also to nonmembers and to the public in general. Indeed, women already participate in Rotary activities both as guests and frequently as speakers and honorees. It is only with respect to voting membership and eligibility to hold office that Rotary clings to its policy of discrimination.

Rotary members are welcome, and have a right, to attend any of over 22,000 Rotary clubs worldwide. (App. E-1; J.S. App. C-36.) For instance, in the Seattle area alone there are over 30 Rotary clubs. (App. D-1 to D-2.) Instead of

local clubs remaining secluded from each other and the outside world, Rotary members are encouraged, indeed required, to attend other clubs when they travel, in order to meet Rotary's attendance requirements.[15] (J.S. App. C-28.) A member of even a small Rotary club can thus be expected to associate with a large number of the more than one million Rotary members--whom he has had no voice in selecting and who, conversely, have no say in whether he is a Rotary member.

In addition to this interaction among members of different clubs, Rotary clubs do not remain secluded from the public at large. Rotary meetings are generally held

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[15]Attendance requirements are another area in which official Rotary policy is at odds with reality. The official recommended Rotary club by-laws require a member to attend 80% of the meetings in order to maintain Rotary membership. However, the Boston Club has publicly announced that members are only required to attend 60% of the meetings. (App. M-4.) Other clubs similarly do not adhere to the 80% attendance requirement.

at public hotels and restaurants. (App. E-7; M-3.) Likewise, Rotary clubs serve as an important public forum, sponsoring political debates and speakers on a variety of topics of community interest. Such functions are open to nonmembers and to the press. (App. C-3; D-2; E-13; F-3; H-3; M-3.) Indeed, public awards have been presented to non-Rotarian recipients at official club functions. (App. G-2.)

Other Rotary activities similarly lack the seclusive attributes of truly private associations. Women are welcome to attend Rotary meetings as guests and, in an ironic twist, are often invited to speak at Rotary functions. Rotary sponsors high school and college clubs which include women in their membership. In addition, Rotary is well known for its scholarships and international exchange opportunities which include a substantial number of girls and women. (App. E-14.) As with

the Jaycees, there is nothing "private" about Rotary clubs and "numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another." Cf. Roberts, 468 U.S. at 621.

D. Business Purposes and Functions.

Although service may be a significant activity of Rotary clubs, the fact is that business purposes and benefits are the primary motivation for many members to participate in Rotary. While "official Rotary policy" ostensibly precludes members from obtaining business benefits from Rotary membership, policy again collides with reality. Rotary International should not be permitted to hide behind the transparent screen of officialdom.

It cannot be disputed that Rotary clubs serve as meeting grounds for business and professional men and provide a

place where business referrals and contacts are made. (App. C-2 to C-3; E-1 to E-3, E-6 to E-7; G-2 to G-5; H-1 to H-2.) This "network of business contacts . . . valuable in terms of professional development" (see App. M at 1) which Rotary membership offers is clearly an important inducement in attracting new members.

Moreover, whatever Rotary International's "policy" documents may say, most Rotary members themselves view Rotary membership as having an important business function. The majority of members' dues are either paid for by their employers or deducted as "reasonable and necessary" business expenses on the members' federal

income tax returns.[16] (App. C-1; D-1; E-9; H-1; J.S. App. C-25.)

The determination of whether a particular organization merits constitutional rights of intimate association "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." See Roberts, 468 U.S. at 620. Marking one point along that spectrum, this Court's recent decision in Hishon v. King & Spalding, 467 U.S. 69 (1984), established that a private law partnership may be prohibited from

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[16]The federal tax code permits club dues to be deducted as business expenses only if the club membership is "used primarily for the furtherance of the taxpayer's trade or business" and is "directly related to the active conduct of such trade or business." See 26 U.S.C. § 274(a)(2)(C) (emphasis added). Deduction of Rotary club dues has been upheld as a "reasonable, ordinary and necessary" business expense. Holland v. United States, 311 F. Supp. 422, 428-30 (C.D. Cal. 1970).

discriminating against women in the selection of partners, even though such decisions are highly subjective and involve the choice of individuals with whom other partners in the firm must associate on a day-to-day basis in the practice of their profession.

If the million-member Rotary organization is compared to a private law practice, there can be no question but that Rotary involves fewer, rather than more, indicia of intimate personal relationships. Since a private law firm can be prohibited from refusing to accept women as partners in a close working relationship, certainly Rotary is not entitled to shield its discriminatory membership policy behind a claimed freedom of intimate association. Given the size of many local clubs and of the organization as a whole, the active recruitment of new dues-paying

members, the lack of individual selectivity in actual practice, the openness of Rotary meetings and activities to the public at large, including women, and the critical commercial function of the organization as an opportunity to develop business and professional contacts, Rotary, like the "large business enterprise" that it is, "seems remote from the concerns giving rise to this constitutional protection." Roberts, 468 U.S. at 620.

III. Any Incidental Infringement of Rotary International's Claimed Right of Expressive Association Is Justified by Compelling State Interests in Eliminating Discrimination Against Women.

As this Court recognized in Roberts, state legislation prohibiting gender discrimination in places of public accommodation may clash with claimed rights to freedom of expressive association. Even assuming, arguendo, that Rotary International is engaged in expressive activities

protected by First Amendment freedom of association, "[t]he right to associate for expressive purposes is not, however, absolute." Roberts, 468 U.S. at 623. The question then becomes whether the state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [Rotary] may have on the male members' associational freedoms." Id.

A. The Admission of Women as Members of Rotary Would Not Interfere With Any Constitutionally Protected Expressive Activities.

Although Rotary International asserts in a conclusory fashion that it would be harmed if required to allow the admission of women members, it has made no substantial showing, as required by Roberts, that admission of women would "impede the organization's ability to engage in [constitutionally] protected activities or to disseminate its preferred views." 468

U.S. at 627-28; see also Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). In the absence of a "showing far more substantial," this Court should "decline to indulge in the sexual stereotyping" and "unsupported generalizations," Roberts, 468 U.S. at 628, that underlie Rotary International's claims.

As Justice O'Connor observed in Roberts, the Court should at the threshold examine whether Rotary's predominant activities and purposes are in fact expression entitled to protection under the First Amendment. 468 U.S. at 633, 635 (O'Connor, J., concurring). If not, then Rotary is entitled to only the minimal constitutional protections afforded to commercial association. Id. at 634; see also, e.g., Ohralik v. Ohio State Bar Association, 436 U.S. 447, 459 (1978); Railway Mail Association v. Corsi, 326 U.S. 88, 93-94 (1945). At most, Rotary's

activities fall only secondarily within the ambit of protected expression. While these clubs do engage in worthy civic and community activities, in actuality Rotary functions primarily as meeting grounds for the male business and professional community.

Even if Rotary's activities were characterized as expression, its associational freedom is still subject to reasonable regulations, narrowly drawn to serve the compelling state interest in removing barriers to the economic advancement of women. Like the Jaycees, Rotary International "has failed to demonstrate that the [Unruh] Act imposes any serious burdens on the male members' freedom of expressive association." Roberts, 468 U.S. at 626.

Nowhere in its brief does Rotary International identify any expressive purposes of the organization other than that

its members engage in "civic," "charitable" and "community service" activities. (Appellants' Br. at 16.) How any such "message" would be changed by admitting women as members of the organization is not explained. In fact, as previously discussed, women already participate in Rotary meetings and many other activities, plainly contradicting any claim that the inclusion of women would impair Rotary's collective voice.

Moreover, the record in the Seattle litigation demonstrates that many Rotarians desire to include women members in Rotary. From individual members to club presidents, district governors and even the president of Rotary International, many people within Rotary itself, including these amici, affirmatively wish to associate with women as members of the organization. These Rotarians foresee acceptance of women members as enhancing

and extending, rather than detracting from, Rotary's ability to pursue its associational goals. (App. A-2; B-1 to B-2; D-3; E-4; F-2 to F-4; J; K; L; N.)

California and Washington, as well as Massachusetts and other states, have a compelling interest in eradicating gender discrimination and providing equal access to quasi-public organizations such as Rotary. These interests outweigh any interest Rotary may have in freedom to exclude women members. Rotary's expressive rights will be affected only slightly, if at all, by giving voting membership rights to the same business and professional women who already share the group's views and already participate to a substantial degree in its activities. The only significant results will be the elimination of a remaining bastion of male privilege, and a corresponding broadening and strengthening of the membership base

to support Rotary's worthwhile service activities.

Since Rotary International's assertion that the admission of women would impair the message communicated by its collective voice or impair a symbolic message is, as in Roberts, "attenuated at best," see 468 U.S. at 627, the Court should reject Rotary's claim to constitutional protection for its continued discrimination against women. The California statute at issue here, like the Minnesota statute upheld in Roberts, "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." Roberts, 468 U.S. at 629 (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).

B. Because Rotary Has Business Purposes and Fulfills a Business Function for Its Individual Members, Society's Interest in Eliminating Sex Discrimination Outweighs Any Interest of Rotary International in Freedom to Not Associate With Women as Members.

Wholly apart from whether Rotary's activities qualify as First Amendment expression, and even if the messages communicated by the organization would arguably be affected by the inclusion of women members, this Court should still uphold the right of states to prohibit gender discrimination in organizations such as Rotary which offer business and commercial advantages to their members. While there may be some kinds of organizations which states should not be allowed to require to admit women members, Rotary is not such an organization.

These amici urge the Court to adopt a two-part test, based both on the purposes of the organization and on the motivations

of its members, for determining whether the societal interest in prohibiting gender discrimination outweighs claimed associational rights of any particular organization:

> If (a) the organization itself has any significant business or commercial purposes or if (b) business or commercial advantages are any significant reason for members to join the organization, then the organization should be deemed to be engaged in commercial association and should not be entitled to constitutional protection for decisions to discriminate in membership on the basis of gender.[17]

This test allows an appropriate measure of protection for truly private groups such as purely social men's or women's clubs, or organizations like the Boy Scouts or Girl Scouts, which have no business

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[17]While a similar test might be appropriate in the context of discrimination on the basis of other categories such as race, religion or political views, such questions are not before the Court and can be left for subsequent consideration.

purposes or functions.[18] At the same time, it does not allow an organization to bar women--or men, for that matter--from access to business advantages by hiding behind a cloak of ostensible privacy.

While the result in Roberts was correct, Justice O'Connor is right that the opinion did not articulate a clear standard capable of determining whether states' interests in prohibiting discrimination take precedence over claimed associational rights in any given instance. If applied literally, the Roberts majority's focus on whether required admission of women might "change the content or impact of the organization's speech," see

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[18]The Court need not address issues raised by such other decisions of the California courts as Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212 (1985), or Curran v. Mt. Diablo Council of the Boy Scouts, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), appeal dismissed, 468 U.S. 1205 (1984), which are not before the Court in this case.

468 U.S. at 628, would permit wholesale discrimination to remain unchecked so long as any part of the organization's activities were devoted to expression of views opposed by the group subject to discrimination. Cf. 468 U.S. at 632-33 (O'Connor, J., concurring).

Yet a test based on whether "the association's activities are not predominantly of the type protected by the First Amendment," id. at 635, leads to exactly the same problem of being simultaneously "overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns."[19] Id. at 632. Moreover, such a

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[19]Discrimination by organizations with clear commercial purposes would be protected as long as other expressive activities "predominated" over the business functions, while genuinely noncommercial organizations could lose the right to determine their own membership if they were not "predominantly engaged in protected expression." Cf. Roberts, 468 U.S. at 632-33 (O'Connor, J., concurring).

test proves elusive, even circular, in application. "Determining whether an association's activity is predominantly protected expression," id. at 636, often depends in the final analysis on whether the organization's membership decisions are deemed to be protected. As even Justice O'Connor concedes, the line drawn is "fluid and somewhat uncertain," 468 U.S. at 637, and will be "difficult" to discern. Id. at 636.

Although not sufficient by itself, the approach of excluding commercial associations as having no First Amendment protection for membership discrimination is appropriate. Justice O'Connor is correct, of course, that freedom of commercial association is entitled to "only minimal constitutional protection." Roberts, 468 U.S. at 634 (O'Connor, J., concurring); see also, e.g., Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). The first part of

the test proposed here recognizes that distinction by classifying as commercial, and therefore subject to state regulation rationally related to legitimate governmental interests, any organization whose involvement in commercial activity is more than insubstantial.[20]

The remaining element in the analysis, though, is that individual members of the organization may choose to associate or not to associate for any number of reasons. Any test focusing solely on the

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[20]A court should not be required to determine whether the organization's activities are "predominantly" commercial. Whenever the level of business or commercial involvement is significant (i.e., not insubstantial or more than minimal), the compelling state interest in eliminating discrimination must take precedence over "potentially expressive activities that produce special harms distinct from their communicative impact." See Roberts, 468 U.S. at 628. "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." Id. at 636 (O'Connor, J., concurring) (emphasis added).

purposes and activities of the organization thus ignores the other half of the picture--the activities and motivations of the members. No matter what an organization says its purposes are, if a substantial motivation for individuals to join the organization is to gain business or commercial advantages, then the organization fulfills a commercial function and cannot be considered to be "private" in a constitutional sense.

"[L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact," gender discrimination in publicly available goods, services or other advantages is "entitled to no constitutional protection." Roberts, 468 U.S. at 628 (citing Runyon v. McCrary, 427 U.S. 160, 175-76 (1976)) (emphasis added). "Invidious private discrimination

may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Norwood v. Harrison, 413 U.S. 455, 470 (1973), quoted in Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (emphasis added). Whenever gender-based membership limitations operate to bar women from access to business advantages available to men, states' legitimate interests in prohibiting discrimination must take precedence over claimed rights of associational freedom.

When this test is applied to Rotary International, it is clear that Rotary plays a distinct commercial role and that its claimed associational rights must therefore be subject to regulation by narrowly drawn, content-neutral state

statutes prohibiting membership discrimination on the basis of gender. The California courts have held that both Rotary International and the local Duarte club, as organizations, have commercial attributes and are therefore "business establishments" under the Unruh Act.[21] (J.S. App. C-16 to C-27.) Moreover, whether or not the organizations have substantial business or commercial purposes, the evidence is overwhelming--in this case, in the Seattle litigation and elsewhere--that business or commercial advantages are a very substantial, if not the primary, motivation for individuals to join the Rotary organization.

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[21] Indeed, the record demonstrates that Rotary International is a business in itself, with an administrative organization, a multi-million-dollar budget, and a central staff of more than 350 employees. It receives revenues from club dues, conference fees, subscriptions to a variety of publications, sales of advertising, and license and royalty fees for use of Rotary insignia.

A "variety of goods, privileges and services flow from membership in a local Rotary club." (J.S. App. C-29.) Rotary clubs serve as meeting places where valuable contacts with other local professionals and business leaders are made and cultivated. Through the neutral ground of civic and charitable activities, proverbial "old boys" networks are developed.[22] Corporate employers frequently believe that these contacts are valuable enough that they pay membership dues for key employees to belong to Rotary. (J.S. App. C-26; App. D-1; E-9.) Members who pay their own dues generally deduct those dues on federal income tax returns as "reasonable and necessary" business

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[22] See, e.g., Burns, The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.-C.L. L. Rev. 321 (1983); Goodwin, Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door, 13 Sw. U.L. Rev. 237 (1982).

expenses "primarily" and "directly" related to business purposes. (J.S. App. C-26; App. C-1; E-9; H-1.)

> This evidence leaves no doubt that business concerns are a motivating factor in joining local clubs. While Rotarians perform numerous and commendable charitable services at the local, national and international levels, the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers.
>
> . . . By limiting membership in local clubs to business and professional leaders in the community, [Rotary] International has in effect provided a forum which encourages business relations to

> grow and which enhances the commercial advantages of its members.

(J.S. App. C-26.)[23]

The entire Rotary organization is based on the "principle" of professional classifications. Its membership is limited to active business and professional leaders. (E.g., Appellant's Br. at 7-8.) The purpose, and the reality, of Rotary membership is that it provides business contacts and commercial advantages to those who join. When women are excluded from Rotary, they are not just denied the opportunity to contribute to society; Rotary membership is also, quite literally, admittance to the established power structure in many communities. Rotary's

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[23] "Membership in Rotary can enhance the careers of [executives] and professionals." (App. M-5.) Evidence in the Seattle litigation confirms that the business advantages Rotary membership provides is a primary motivation for members to join. (App. B-1; C-2 to C-3; E-6 to E-7; H-1.)

refusal to admit women blocks their access to many of the advantages men have enjoyed for years and perpetuates the "barriers to economic advancement," see Roberts, 468 U.S. at 626, that have historically kept women from achieving equality with men in the business world.

CONCLUSION

The existing record clearly shows that Rotary is a large, diverse organization with an inclusive membership and that women already participate in its activities to a substantial degree despite their exclusion as voting members. The record also establishes that admission of women would have no significant impact on any protected expressive activities of the organization or its members and that, despite its self-serving official statements, Rotary in fact has substantial business purposes and functions which are a primary

motivation for members to join.[24]

The Court should reject Rotary International's contention that the First Amendment excuses it from complying with narrow, content-neutral state statutes requiring public accommodations and advantages to be available to all citizens without discrimination on the basis of

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[24]Nevertheless, the Court should be aware that, as discussed throughout this brief, many additional facts demonstrating the large, non-selective and business-related character of the Rotary organization could be presented by other litigants in other circumstances. No matter what the Court rules in this case involving the Duarte, California Rotary club, it should not foreclose other clubs from challenging--in the pending Seattle litigation or elsewhere--Rotary's outdated and discriminatory membership policy.

gender. The judgment of the California Court of Appeal should be affirmed.

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